REMARKS

This application has been carefully reviewed in view of the above-referenced Office Action, and reconsideration is requested in view of the following remarks.

Regarding the Addington Reference

This reference is used as the primary reference in all rejections. It is noted that the Addington reference was filed on Nov. 12, 2003. Applicant claims priority of a provisional application filed on Nov. 3, 2003 – nine days prior to the reference's filing date. Hence, on its face the present application is not prior art except to the extent that the disclosure relied upon for the rejection is present in the applications to which Addington claims priority benefit.

It is noted that the Addington reference claims priority of two provisional applications filed on June 20, 2003 and October 15, 2003. The undersigned has obtained copies of these provisional applications and notes that these applications are apparently preliminary specifications bearing the name of the assignee N2 Broadband, Inc. However, the documents bear little resemblance to the Addington patent as filed or issued. Applicant, after reviewing all of the provisional applications, is unable to find adequate disclosure in the provisional applications to support the rejection and no guidance has been given in the Office Action.

The undersigned notes that the courts have held that for purposes of making a rejection, the effective date of a reference in a chain of applications depends upon the sufficiency of the disclosure of the earlier filed application. By way of example, in *In re Wertheim*, 646, F.2d 527, 209 USPQ 554 (C.C.P.A. 1981), the Court stated:

> "[T]he phrase in section 120(e), 'on an application for patent,' necessarily invokes Section 120 rights of priority for prior co-pending applications. If, for example, the PTO wishes to utilize against an applicant a part of that patent disclosure found in an application filed earlier than the date of the application which became a patent, it must demonstrate that the earliest filed application contains Sections 120/112 support for the invention claimed in the reference patent ... [O]nly an application disclosing the patentable invention before the addition of new matter, which disclosure is carried over

into the patent, can be relied upon to give a reference disclosure the benefit of its filing date for purposes of supporting a Section 102(e)/103 rejection." (emphasis added)

This is identically the present situation. In the absence of specific references to the provisional applications, the undersigned has no guidance from the present Office Action as to the applicability of the Addington provisional applications as prior art in formulating the present rejection. It is therefore submitted that:

1. The Addington does not qualify as prior art for its asserted disclosure since its actual filing date (absent priority benefit) and publication date are both after the filing date of the present application.
2. The provisional applications from which Addington claims priority do not on their face appear to contain the disclosure necessary to support the present rejections.
3. In the event the undersigned is mistaken as to the disclosure of the provisional applications, the Office Action is not in compliance with 37 C.F.R. 1.104(c)(2) which states in part "When a reference is complex or shows or describes inventions other than that claimed by the applicant, the particular part relied on must be designated as nearly as practicable. The pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified." In this case, the referenced disclosure of the issued patent bears no resemblance to the only documents in the chain of priority that constitute prior art. Therefore, Applicant has no guidance as to interpretation of the rejection in view of the provisional applications.

Hence, it is submitted that all rejections are improper and the Office Action fails to establish *prima facie* unpatentability of any claim in view of the apparent inapplicability of the Addison patent, and a lack of specificity as to the applicability of the priority document of Addison in making a rejection.

Regarding the Rejections under 35 U.S.C. §102

Claims 41-57 were rejected based upon Addington. The above remarks are applicable. Moreover, it is noted that even if Addington were available as prior art, the reference to col. 43, lines 15-30, col. 12, lines 2-5 and col. 45, lines 39-41 are silent as to the claim feature of "storing

default decryption information" or similar language as claimed in one form or another in each of the claims. For at least this reason, claims 41-57 are allowable even if Addington were available as prior art. Reconsideration and allowance of claim 41-57 are respectfully requested.

Regarding the Rejections under 35 U.S.C. §103

Claims 1-40 were rejected on the combination of Addington and Bestler of record. As noted above, Addington is not available as prior art against this application.

However, even if Addington were available, the reference to col. 43, lines 15-30, col. 12, lines 2-5 and col. 45, lines 39-41 are silent as to the claim feature of "storing default decryption information" or similar features as claimed in one form or another in each of the claims. For at least this reason, claims 1-40 are allowable even if Addington were available as prior art.

The Bestler, as best understood, fails to adequately supplement this disclosure since it discusses alternation among stored keys, but such keys appear to be used for global data packets. The undersigned finds no teaching as to use of a default encryption of content in the event of a communication failure between a conditional access system and a conditional access management system as claimed.

Reconsideration and allowance of claims 1-40 are respectfully requested.

Declarations

Even though the Addington reference is from all appearances not available as a reference in the present application, enclosed herewith is a declaration under rule 131 anti-dating the reference's earliest filing date. Accordingly, the actual date of invention is established to be earlier than June 20, 2003.

Concluding Remarks

The undersigned additionally notes that many other distinctions exist between the cited art and the claims. However, in view of the clear distinctions pointed out above, and failure of the Addington reference, it is submitted that further discussion is unnecessary.

Minor amendments have been made only for clarifying purposes. No amendment made herein was related to the statutory requirements of patentability unless expressly stated herein. No amendment made was for the purpose of narrowing the scope of any claim unless an argument has been made herein that such amendment has been made to distinguish over a particular reference or combination of references.

Interview Request

In view of this communication, all claims are now believed to be in condition for allowance and such is respectfully requested at an early date. If further matters remain to be resolved, the undersigned respectfully requests the courtesy of an interview. The undersigned can be reached at the telephone number below.

Respectfully submitted,

/Jerry A. Miller 30779/

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